Office-Supreme Court, U.S.
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JUL 6 1981
ALEXANDER L. STEVAS,
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81-20

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MICHAEL GUIDRY,
Petitioner,

versus

CONTINENTAL OIL COMPANY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

PETITION FOR CERTIORARI

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QUESTION PRESENTED

Given the undisputed fact situation that a shipowner is aware of the existence of defective gear and hazardous conditions created by him, which pose an unreasonable risk of harm to the longshoremen, does such a shipowner have a duty to intervene and repair the defective gear and eliminate the hazardous conditions during cargo operations?

PARTIES TO THE PROCEEDINGS

Under Rule 21.1(b), counsel for Michael Guidry, certifies that the following are parties to this proceeding:

Michael Guidry, Petitioner

Continental Oil Company, Respondent

Marlin Drilling Company, Respondent

Offshore Casing Crews, Inc., Respondent

J. MINOS SIMON

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No.

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PETITION FOR CERTIORARI

TO THE HONORABLES, THE CHIEF JUSTICES AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

OPINIONS BELOW

This is an application for a writ of certiorari to the United States Court of Appeals, Fifth Circuit, as to its decision of March 9, 1981, timely rehearing application denied on April 6, 1981 whereby petitioner's suit against a shipowner based on maritime negligence un-

der LHWCA §905(b) was dismissed. The decision of the appellate court instances a misapplication of the shipowner's duty to a stevedore and is contrary to this Court's yet unreported decision of *Scindia Steam Navigation Company, Ltd. vs. De Los Santos, et al,* decided April 21, 1981. The unreported decision of the appellate court is reproduced in the appendix at pages 1a-25a.

JURISDICTION

This application for a writ of certiorari invokes the jurisdiction of the court pursuant to 28 U.S.C.A. 1254; 28 U.S.C.A. 2101 and Supreme Court Rules 19, et seq.

STATUTE INVOLVED

The pertinent statute involved is 33 U.S.C. §905(b). See Appendix D, at pp. 32a-33a for verbatim text.

CONCISE STATEMENT OF THE CASE

This involves a claim for personal injuries under 33 U.S.C. §905(b). The decision below espouses a shipowner's duty concept rejected by this Court in the yet unpublished decision in *Scindia Steam Navigation Company, Ltd. vs. De Los Santos, et al,* docket number 79-512, decided April 21, 1981.

On July 6, 1976 petitioner sustained severely disabling, permanent injuries while working on board a special purpose vessel, Marlin #6 (a drilling barge) in navigable waters in the Gulf of Mexico. Petitioner was

employed by Offshore Casing Crews, Inc., a specialist in setting and removing casing pipe in oil rigs. Marlin Drilling Company (Marlin) had contracted with Continental Oil Company (Continental) to drill an oil well using its drilling barge, a self-elevated mobile drilling platform. After presenting his evidence to a jury a motion for directed verdict on behalf of Marlin and Continental was granted, petitioner's lawsuit dismissed and the appellate court affirmed.

Petitioner's claim against Marlin and Continental is predicated on their negligence in providing him with defective ship's gear intended for use by him, and in creating hazardous conditions to which it was expected he would be exposed in carrying out his cargo operations aboard the vessel. The evidence presented to the jury by petitioner establishes, by reasonable inferences or uncontradicted facts, the following ultimate facts.

The hierarchy of command aboard the vessel Marlin #6 instituted Continental the ultimate authority, followed by Marlin over Offshore. After arriving at the rig, petitioner and his crew were assigned quarters at the direction of Continental's representative as preparations for pushing the casing had not been completed. Approximately twenty-four hours after arriving at the platform petitioner was called to the rig floor to commence his duties. Upon reaching the rig floor petitioner discovered that Marlin had already placed

the various casing equipment on the rig floor. Included among the equipment on the floor were elevators, baffle plates, tongs, and a hydraulic power unit. This latter unit alone was approximately five and one-half to six feet tall and nine feet long. Normally, such equipment is placed on the drill floor in its sequential order of use and at the direction of the casing crew. This procedure is followed because usually the area of the drill floor is too small to safely accommodate the simultaneous placing of this equipment on it. After petitioner's crew reached the drill floor Marlin's crane operator continued to place equipment on the drill floor over the protest of members of the casing crew. In addition to placing the casing equipment on the drill floor, Marlin placed ten thousand feet of drill pipes stacked vertically to the left of the V-door and drill pipe nubbings similarly stacked near the V-door on the drill floor. Also on the drill floor over the oil well hole Marlin has installed an upset rotary table. Normally, the top of a rotary table is flushed with the floor. Marlin's table, however, was one step above the drill floor and played a dominant role in plaintiff's injuries.

The Marlin #6 was equipped with varying hoisting devices, designed to lift the casing equipment in place for use. Except for a jerkline, all of the hoisting devices were operated from behind drawworks situated to the rear of the drill floor. The drawworks operator has visual access to the drill floor through a peephole in the drawworks structure. Because of the smallness of the aperture the operator's view from the drawworks is ex-

tremely limited and in this case, because of such visual impairment, he was unable to see the movement of the equipment as he hoisted it about, in consequence of which he had to rely on hand signals from co-workers. The operator's view of the drill floor was further restricted by the presence of the ten thousand feet of drill pipe, which was not needed for setting casing pipe. The power unit normally is stationed on a floor below the drill floor and away from the working area of the casing crew. It was placed on the drill floor by Marlin because Marlin negligently failed to supply hydraulic hoses, needed for its operation, sufficiently long to permit placing it on the floor below the drill floor.

Because of their experience in oilfield operations and because of their presence on the drill floor prior to the time that the casing crew began their work, and their involvement in the placement of the casing equipment on the drill floor, representatives of Continental and Marlin were (a) aware of the congestion of the drill floor brought about by Marlin's simultaneous placing of all the casing equipment on the drill floor, (b) aware of the limited view of the drill floor by the drawworks operator, secondary to the inadequacy of the viewing aperture in the drawworks board, (c) aware that the drawworks operator's view of the drill floor was further obstructed by the existence of the ten thousand feet of drill pipes placed in the V-door by Marlin, (d) aware that because of such visual obstructions the drawworks operator would have to rely on hand signals from the co-workers in moving the heavy

equipment about on the rig floor, (e) aware of the real potential for equipment entanglement on moving of such equipment, secondary to equipment congestion, (f) aware of the existence of water and mud on the drill floor that made the drill floor slippery, and (g) aware that the rotary table was exceptional in that it was a step higher than the drill floor.

Petitioner sustained his injuries when an effort was made to move the elevators, weighing some two thousand (2,000) pounds, over the rotary table by the use of an available hoisting device. The rotary table was situated between the drawworks and the elevators. The hoisting device was at the drawworks station. Movement of the elevators to the rotary table was to be accomplished by attaching the cable from the drawworks hoisting device to the elevators. The operator would then slowly lift the elevators and as a result of such lifting the elevators would drag along the rig floor surface [dragging functioned as a restraining control mechanism] until they reached the rotary table. Because of the obstruction to vision the drawworks operator had to rely on one of his co-workers to give him hand signals concerning the movement of this piece of equipment. Responding to such hand signals the drawworks operator slightly raised the elevators from the rig floor. Because of the congestion of equipment the elevators hung up on another piece of equipment on the floor. Because of his obstructed view, the drawworks operator did not see the entanglement of

this equipment and continued to lift the elevators. When petitioner observed the equipment entanglement he rushed to the elevators in order to disengage them, and in this moment, placed himself between the elevators and the rotary table. The elevators suddenly became disentangled. But because the drawworks operator had continued hoisting the elevators, unaware that they had become entangled, the undersurface of the elevator was free of the floor and thus unobstructedly swung toward the rotary table, pushing petitioner toward the rotary table. Because of the muddy condition of the drill floor, petitioner was unable to extricate himself from his precarious position and as a result the elevators crushed his foot against the elevated rotary table resulting in his permanently disabling injuries.

While acknowledging that Continental's representative had ultimate control over the operation, the district court held that Continental had no "duty of supervising the details of the work" and directed verdict as to it. The directed verdict was also granted as to Marlin on finding by the district court that no Marlin representative "was on the floor" at the time the accident occurred and therefore had no "part in directing any action at that time". Moreover the district court held that petitioner "was the person who had the primary duty and responsibility to observe that, both for safety of himself and for the safety of his crew and in the interest of proper and efficient operations." Further the district court concluded that the drill floor "before the lift was

accomplished was not dangerous and did not have a dangerous potential *until lifted*". In short, the district court held that normal use of the equipment in the condition created by Marlin and delivered to petitioner presented a safety hazard to petitioner and his coworkers. Nevertheless the district court concluded that neither Continental nor Marlin owed any duty of safety to petitioner under such circumstances. The Court of Appeals, Fifth Circuit, adopted a similar standard of duty or liability as to Continental and Marlin. While acknowledging the defective condition of the Marlin #6 drawworks in terms of the limited visibility of the drawworks operator, the congested condition of the rig floor and the existence of "mud and water" on the rig floor, the appellate court held that "there is insufficient basis to support any general maritime negligence claim against Continental". The appellate court for similar reasons affirmed the judgment as to Marlin. In rationalizing its affirmance the court stated that "this circuit has adopted a negligent standard governed by concept of a land owner's duties to his invitee as enunciated in section 343 A (1) of the Restatement (Second) of Tort. * * * We acknowledge that the Ninth Circuit has established a contrary standard".

The decision of the appellate court was rendered one month before this Court's decision in *Scindia Steam Navigation Company, Inc., vs. De Los Santos*. The appellate court's decision is contrary to *Santos* and remedial writs should be granted to correct that erroneous decision.

SUMMARY OF ARGUMENT

Marlin was the owner of the vessel involved in this litigation. Continental, by contract, had ultimate control over the vessel and as such must share the responsibility for defective and hazardous conditions of the vessel.

Continental and Marlin provided petitioner with defective ship's gear to be used by petitioner in cargo operations aboard the vessel. Continental and Marlin negligently created hazardous conditions to which they knew petitioner would be exposed in connection with cargo operations aboard the vessel. Continental and Marlin, as reasonable persons, knew, or should have known, that the defective gear and the hazardous conditions created by them posed an unreasonable risk of harm to petitioner. Notwithstanding such knowledge, Continental and Marlin effectively turned their backs on the cargo operations and negligently failed to take any steps to eliminate or neutralize the defective gear or the hazardous conditions. The defective gear and hazardous conditions combined to bring about as a cause in fact totally disabling injuries to petitioner. Under the decision of this Court in *De Los Santos*, Continental and Marlin had the inescapable duty to intervene and repair the defective gear and eliminate the hazardous conditions. Their failure to do so constitutes a proximate cause of plaintiff's injuries. The decision of the appellate court exonerating Continental and Marlin of any responsibility to petitioner is based upon

the erroneous premise that Continental and Marlin owed no duty to petitioner that extended into the confines of cargo operations. The decision of the appellate court is contrary to the decision of this Court in *De Los Santos*. The appellate court committed reversible error and consequently its decision must be reversed.

ARGUMENT

Given The Undisputed Fact Situation That A Shipowner Is Aware Of The Existence Of Defective Gear And Hazardous Conditions Created By Him, Which Pose An Unreasonable Risk Of Harm To The Longshoreman, Does Such A Shipowner Have A Duty To Intervene And Repair The Defective Gear And Eliminate The Hazardous Conditions?

It is true that petitioner incurred his injuries while engaged in "cargo operations" but the danger which accounts for his injuries arises from defective gear and hazardous conditions created by the shipowner. As a result, the question of a shipowner's duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore is not involved in this case. It is not involved because the essential hazardous conditions responsible for his injuries existed prior to the "cargo operation", and the shipowner was aware of their ex-

istence prior to the "cargo operation". In fact, the shipowner created the hazardous conditions involved. At least six essential hazardous conditions were created by the shipowner: (1) the inadequate peephole in the drawworks structure of the vessel was a structural defect of such magnitude as to substantially obstruct the drawworks operator's view of the drill floor to the extent of preventing him from observing the equipment which his duties obliged him to move [as to this the appellate court found that "the catline was operated from behind the driller's stand which provides a *limited view* of the drill floor]; (2) the view of the drawworks operator was further substantially obstructed by the existence of ten thousand feet of pipes placed in the V-door by the shipowner prior to the start of the "cargo operation"; (3) mud and water on the drill floor, existing prior to the "cargo operation", made the drill floor slippery and, therefore, hazardous to the stevedore; (4) the shipowner placed all of the casing equipment on the drill floor simultaneously, thereby creating equipment congestion, knowing that such equipment had to be moved, and thus, as a reasonable person, knew such a condition posed a safety hazard to the stevedore; (5) the power unit, always stationed a floor below the drill floor, had to be placed on the drill floor, because of the shipowner's negligence in providing too short a hydraulic hose, thus further congesting the drill floor and increasing the already existing safety hazards; (6) the rotary table in use, unlike those customarily used, was not flush with the drill

floor, but extended above it and as such posed a safety hazard.

There is no dispute but that all of these hazardous conditions combined and concurred during the cargo operations to bring about petitioner's injuries. Equally beyond dispute is that petitioner had no choice but to work with the shipowner's defective gear and to expose himself to the risk of the hazardous conditions created by the shipowner. His was the duty to work — work fast — or face dismissal. Thus, petitioner's duties were such that he could not avoid the danger posed by these hazardous conditions. The legal question presented, therefore, is whether or not, under such circumstances, the shipowner has a duty to take steps to eliminate or neutralize these hazards.

The appellate court answered that question in the negative. In rationalizing its decision as to Continental the appellate court reasoned:

> "No Continental employee was on the rig floor at the time of the accident nor did any Continental employee have anything to do with, or responsibility *for, this operation.*" (Emphasis added)

It may be true that no Continental employee was on the rig floor "at the time of the accident" but the evidence is unanimous that a Continental employee was on the rig floor prior to the accident and knew, or as a reasonable person should have known, of the ex-

istence of the defective gear and the hazardous conditions created by this shipowner. As such, Continental knew or should have known, before cargo operations began, that the danger to petitioner arose from the defective gear of the vessel and the hazardous conditions created by the shipowner. Forasmuch as Continental had the ultimate authority in connection with the operation of the vessel, the vessel to that extent was under its control and therefore Continental must share the responsibility for the hazardous conditions of the vessel. Therefore Continental's absence "at the time of the accident" is irrelevant to the existence of its legal duty, because its prior knowledge of the safety hazards was sufficient to trigger the duty to take remedial action, if such duty exists. It is equally without merit to submit, as the appellate court did, that Continental is not liable because it had nothing "to do with or responsibility for" the cargo operations, if indeed its prior knowledge of the safety hazards gives rise to the legal duty to take steps, reasonable in the circumstances, to eliminate or neutralize the hazards which in this case were created by the shipowner.

The appellate court applied a similar rationale in exonerating Marlin from liability to petitioner. The appellate court further concluded that a shipowner is liable to a stevedore only for nonobvious hazards. In verbalizing such a standard of negligence the appellate court stated:

> "'* * * these negligence criteria 'subject a shipowner to liability *only* if he knows or has reason to know of an unreasonably dangerous condition on the vessel of which the [employee] is probably *not aware* and fails to exercise reasonable care to make the conditions safe or warn the longshoreman', *Mallard*, 634 F.2d at 243. We acknowledge that the Ninth Circuit has established a contrary standard."

Moreover, the appellate court held that the shipowner is not liable for obvious hazards, regardless of their nature, and the circumstances, where the hazards are "perfectly apparent" to the stevedore. Said the appellate court in this respect:

> "If the location of some of the tools afforded some obstacle to a safe performance of the work, the condition was *perfectly apparent* to all with no showing that the condition or its hazards would not be known to Guidry and his crew." (emphasis added)

In effect the appellate court has decided that where an unsafe condition exists aboard a vessel, whether the result of defective gear or otherwise, its obviousness alone exonerates the shipowner of any liability to a stevedore compelled to expose himself to the risk of such hazardous conditions and faulty equipment. Such a negligence criterion of shipowner liability is contrary to *Napoli vs. Hellenic Lines, Ltd.*, 536 F.2d 505 (2nd Cir.

1976) and to this Court's decision in *De Los Santos*, supra. In speaking to the shipowner's liability vis-a-vis obvious dangers the court in *Napoli* held:

> "Where dangers are unreasonable, their obviousness, standing alone, should not necessarily relieve a defendant of all responsibility for their presence. Although the invitee (or in this case the employee) may be under a duty to avoid harm likely to result to him from open and obvious dangers, he may not be in a position fully to appreciate the risk or to avoid the danger even though aware of it. For instance, his attention may be distracted or his duties as an employee may require his unavoidable exposure to it. In such circumstances, we must consider whether the land owner (or in this case the shipowner) as the person best able to anticipate and prevent harm from the obvious dangers on premises under his control, should not be under some duty to take corrective actions."

In *De Los Santos* this Court stated that "there are circumstances in which the shipowner has a duty to act where the danger to longshoremen arises from the malfunction of the ship's gear being used in the cargo operation", regardless of the obviousness of the defect. (opinion P. 18) The facts presented in that case indicated that "for two days prior to the accident it had been *apparent* to those working with the winch that this

equipment was malfunctioning". In seeking to escape liability the shipowner submitted that even "if it was aware of the condition" it was entitled to assume that the stevedore "considered the equipment reasonably safe and was entitled to rely on that judgment". In rejecting that position the court held that the shipowner "if it knew of the defect and that Seattle was continuing to use it, should have realized the winch presented an unreasonable risk of harm to the longshoremen, and that in such circumstances it had a duty to intervene and repair the ship's winch. The same would be true if the defect existed from the outset and *Scindia* must be deemed to have been aware of its condition".

That Continental and Marlin were aware of the defective gear and the hazardous conditions of the vessel and that petitioner was duty bound to use such defective gear and expose himself to these hazardous conditions in connection with the "cargo operations" of his crew are beyond dispute. As to these hazardous conditions the appellate court expressly found that "the catline was operated from behind the driller's stand which provides a limited view of the drill floor"; that "Guidry established the rig floor was covered with mud and water and the hoses for the power unit secured by Continental were too short"; that the "drill floor of the Marlin #6 had an upset rotary table" and explained in a footnote to that statement that "this type of rotary table is not flushed with the deck of the rig, but rather, a step up from the rest of the platform floor" indicating another obvious defect with the

vessel. The evidence therefore shows that the shipowner knew prior to the beginning of the cargo operations of the defective gear and the hazardous conditions and knew that petitioner was compelled by his duties to use such defective gear and to work in such hazardous conditions. Under such circumstances the shipowner "should have realized" that the defective gear and hazardous circumstances "presented an unreasonable risk of harm to the longshoremen [petitioner] and that in such circumstances it had a duty to intervene and repair the ship's" hazardous conditions.

If as a matter of law there are "circumstances in which the shipowner has a duty to act where the danger to longshoremen arises from" defective ship's gear "being used in the cargo operation" as well as from hazardous conditions created by the shipowner, as the court held in *De Los Santos*, then petitioner was entitled to have the jury assess the existence of these "circumstances" and make a determination of liability under proper court instructions that delineate the duty of a shipowner to "intervene and repair" the ship's gear and hazardous conditions. Petitioner, however, was denied of such a jury trial. On the contrary, proceeding on an erroneous duty-risk concept of a shipowner's liability, both the district court and the appellate court assumed the position of triers of the facts and held against petitioner.

Burdened by the misconceived notion that the shipowner's duty to the stevedore never extends into

the confines of the cargo operations, it was quite easy and natural for the appellate court to reach the conclusion of non-liability. Under that misconception, excluding the shipowner from the stevedore's cargo operations automatically excludes him from liability. And that is the legal equation adopted by the appellate court. In so doing, the appellate court stated that "we conclude that there is insufficient basis to support any general maritime negligence claim against Continental", because, continued the court, "no Continental employee was on the rig floor at the time of the accident nor did any Continental employee have anything to do with or responsibility for, this operation". But, according to *De Los Santos*, where the shipowner's equipment present "an unreasonable risk of harm to the longshoremen" the shipowner's duty to the stevedore does extend into the confines of the cargo operations.

In petitioner's case the shipowner's equipment was defective resulting in a restricted view of the drawworks operator who had the duty to move the equipment on the drill floor. Both Continental and Marlin knew of this defective gear and knew that petitioner and crew members would have to use that equipment in connection with their cargo operation. Continental and Marlin also knew of the hazardous condition created by Marlin in stacking the casing equipment on the drill floor and in permitting mud and water to exist on the floor and in utilizing an elevated rotary table. Continental and Marlin therefore "should have realized" that the use of such equipment under

such circumstances would present petitioner with an "unreasonable risk of harm" to himself and members of his crew. And as this Court stated in *De Los Santos*, in such circumstances Marlin and Continental "had a duty to intervene and repair" these conditions. Thus, contrary to the appellate court's decision, Continental and Marlin did have something "to do with or responsibility for this operation". Theirs was the responsibility "to intervene and repair" the defective and hazardous conditions. This they failed to do. As a result they violated their duty to petitioner.

Petitioner was entitled to try his case to a jury and have the jury assess all of the evidence, and particularly the question of the negligence of Continental and Marlin. The action of the district court in directing a verdict has denied petitioner of his federally secured right to trial by jury. And the action of the appellate court in affirming the decision of the district court perpetuates that denial. The denial of jury trial, or reciprocally the granting of a directed verdict, is based upon a misconception of the duty of a shipowner to a stevedore as exemplified by this Court's decision in *De Los Santos*. The decision of the appellate court therefore is erroneous and must be reversed.

CONCLUSION

A shipowner has an inescapable duty to intervene and repair any defective gear entrusted to a stevedore for use in cargo operation, where its use presents an

unreasonable risk of harm to the stevedore, regardless of the obviousness of the defect. In this case, Continental and Marlin entrusted to petitioner defective gear for use in cargo operation, knowing, or as reasonable persons they should have known, that the use of such defective gear posed an unreasonable risk of harm to petitioner. Continental and Marlin also knowingly created hazardous conditions prior to the commencement of cargo operations, knowing that such hazardous conditions posed an unreasonable risk of harm to petitioner. Continental and Marlin failed to take any action whatsoever to repair the defective gear or to eliminate and neutralize the hazardous conditions created by them. The defective gear and hazardous conditions combined to bring about totally disabling injuries to petitioner. The proximate cause, therefore, of petitioner's injuries was the breach of duty owed by Continental and Marlin, as shipowners, to petitioner. Petitioner was entitled to present his evidence to a jury and to have a jury assess that evidence and determine his legal rights under adequate court instructions that would define and delineate the duty of Continental and Marlin to petitioner. It was error for the district court to grant a directed verdict and thus deny petitioner the right to trial by jury, and for the appellate court to affirm the action of the district court.

It is respectfully submitted that the decision of the Fifth Circuit Court of Appeals, is erroneous and should be reversed. And finally this cause should be remanded

to the United States District Court for trial by jury of petitioner's claim against Continental and Marlin.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, J. Minos Simon, attorney for petitioner in the foregoing application for writ of certiorari to the United States Court of Appeals, and a member of the bar of the Supreme Court of the United States, hereby certify that on the ____ day of July, 1981, I served three copies of the foregoing petition for writ of certiorari on the following:

(1) Mr. James T. Guglielmo
Attorney at Law
119 North Court Street
Opelousas, Louisiana 70570
Attorney for Continental Oil Company

(2) Mr. John Blackwell
Attorney at Law
420 Iberia Street
New Iberia, Louisiana 70560
Attorney for Marlin Drilling Company

by depositing same in the United States Mail, postage prepaid, and properly addressed.

Lafayette, Louisiana this ____ day of July, 1981.

J. MINOS SIMON

APPENDIX A

Michael GUIDRY, Plaintiff-Appellant,

v.

CONTINENTAL OIL COMPANY et al.,
Defendants-Appellees,

Travelers Insurance Company,
Intervenor-Appellee.

No. 78-3474.

United States Court of Appeals,
Fifth Circuit.

March 9, 1981.

Appeal from the United States District Court for the Western District of Louisiana.

Before BROWN, AINSWORTH and FRANK M. JOHNSON, Jr., Circuit Judges.

JOHN R. BROWN, Circuit Judge:

Plaintiff, Michael Guidry, appeals grant of summary judgment in favor of his employer, defendant, Offshore Casing Crews, Inc. (Offshore), direction of verdict for defendants, Continental Oil Co. (Continental) and Marlin Drilling Co. (Marlin), and imposition of $500 sanction against his counsel for costs and expenses incurred by defendants in general actions for

negligence brought under the Jones Act, 46 U.S.C. §688, and general maritime law. Guidry asserts on appeal District Court erred in (i) granting summary judgment since he was a seaman, (ii) directing the verdict, finding his conduct was the sole proximate cause of the accident, and (iii) imposing the sanction after judgment when the record was not held open, no court order was ever violated, and no motion for sanctions was made. Finding Guidry was not a seaman under the Jones Act and that the sanction was properly imposed, we affirm.

How it all Happened

Offshore is a specialist in setting and removing casing pipe in oil rigs. On July 5, 1976, Offshore sent a casing crew under the direction of Guidry as pusher to oil well Number One owned by Continental and located at East Cameron Block 42, O.C.S.[1] Marlin had contracted to drill the well, utilizing its rig Number Six, a self-elevating mobile drilling platform.

Guidry's assignment to this rig was random, it being his twenty-ninth since commencing his employment with Offshore on January 31, 1976.[2] His connection with most of the structures was brief, usually less than

1 The well was approximately thirty to fifty miles off the Louisiana coast, situated on the outer continental shelf.

2 Guidry was employed only once on twenty-four of the rigs and never ran more than three times casing on any of the structures to which he was assigned. Most of these assignments were to either fixed or jack-up offshore rigs in the Gulf; however, three of Guidry's assignments were to land based rigs.

two days.[3] On this particular occasion, Guidry's crew consisted of Michael Hazlett as stabber[4] and floor hands Thomas Trahan, Carl Simoneaux, and John Breaux.

The drill floor of the Marlin Six had an upset rotary table.[5] As is common in such rigs, the drawworks were situated to the rear of the drill floor while the V-door, the aperture through which drill pipe and equipment is brought onto the drill floor was in front. In addition to a jerkline,[6] the rig was equipped with three lifting devices — the main drum of the drawworks, the catline which operates off an auxiliary drum on the drawworks, and the air hoist. The catline was operated from behind the driller's stand[7] which provides a limited view of the drill floor and V-door through a peephole while the operator of the air hoist had an unrestricted view of the drill floor since the controls are next to the V-door.

After arriving at the rig, Guidry and his crew were assigned quarters at the direction of Continental's

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3 Even some of that time, as much as one-third, would be consumed not by working but by travel to and from structures.

4 Stabber is the term used for the person who is second in command of the crew.

5 This type of rotary table is not flush with the deck of the rig, but rather, a step up from the rest of the platform floor.

6 The jerkline provides lateral movement of equipment and other materials located on the drill floor.

7 The driller's stand is located to the side of the drawworks.

representative as preparations for pushing the casing had not yet been completed. Approximately twenty-four hours after arriving at the platform, Guidry was called to the rig floor to commence his duties.[8] Upon reaching the rig floor, Guidry found Marlin had already placed the various casing equipment on the rig floor. That specialty equipment included, among other things, elevators, baffle plates, tongs, a hydraulic power unit, 10,000 feet of drill pipe, and drill pipe nubbings.

Although Continental was overseer of the well, Guidry and his crew were in charge of the rig floor once they began their casing duties. After spending approximately ten minutes moving the hydraulic unit with the jerkline, Guidry noticed Hazlett was attaching the catline to the elevators. Guidry went over to assist Hazlett,[9] positioning himself in between the elevators and the rotary table so that his back was to Trahan.

Hazlett had previously sent Trahan to operate the catline. As Trahan did not have complete view of the drill floor, Hazlett gave him signals to raise the elevators. The accident occurred when the elevators hung up on one of the other pieces of equipment, causing them to swing toward Guidry. The impact caused Guidry to slip on the muddy, wet rig floor. Although he

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8 During the interim waiting period, Guidry engaged in no activities which contributed to the rig's mission.

9 Rigging up the elevators normally requires the joint efforts of two or three men.

attempted to move out of the way, Guidry's right foot was crushed when the 2,000 pound elevators smashed into the upset rotary table.[10]

Litigation Ensues

Due to the injuries sustained to his foot, Guidry brought this action on July 7, 1977, against Offshore, Marlin, and Continental under the Jones Act and general Maritime law. In his complaint, Guidry alleged he was a seaman "at all times material hereto, . . . permanently assigned as a member of the crew, operating, maintaining and controlling the vessel known as Marlin 6 and his duties encompassed the furtherance of the principal mission of [the] aforesaid vessel." Guidry contends his "injuries resulted from the negligence of defendants, . . . their employees, agents, and/or representatives, as well as the failure of defendants to provide [him] with a safe place in which to work." He also complained the vessel, its equipment, and appurtenances to which he was assigned, were unseaworthy. Offshore and Continental answered, denying Guidry was a seaman under the Jones Act, alleging rather he was limited to claims under the Longshoremen and Harbor Workers' Compensation Act (LHWCA), all of which claims had been met, while Marlin denied Guidry's contentions for lack of sufficient information, averring (i) Guidry's conduct was

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10 Guidry's foot sustained multiple fractures for which he remains permanently and totally disabled.

the proximate cause of the accident, and (ii) he had assumed the risk, Travelers Insurance Company as conpensation insurer for Offshore, claiming reimbursement for compensation and medical expenses paid to Guidry, was permitted to intervene under 33 U.S.C. §933.

Prior to trial, Offshore moved for summary judgment which District Court granted, ruling that the pleadings, depositions, affidavits, and exhibits established beyond dispute Guidry was not assigned to any specific vessel or group of vessels, his assignment to any particular structure was on a random basis, most of the structures on which he ran casing was for a relatively short period of time, during waiting periods he was not performing any services which contributed to the mission of the rig, and he was not a seaman.

The remaining actions against Continental and Marlin, and the claim for reimbursement by Travelers went to trial before a jury. At the close of Guidry's evidence, Continental and Marlin each moved for a directed verdict both of which District Court granted, ruling (i) no showing was made Continental had the duty of supervising the details of the work done by either Offshore or Marlin, (ii) no evidence was before the Court that Marlin's pusher or any member of Marlin's crew was on the rig floor at time of the accident, and Guidry was (iii) in complete control of all actions on the rig floor at the time the accident occurred, (iv) responsible for the safety of himself and his crew,

so that (v) his actions were the proximate cause of the accident, (vi) constituting 100% contributory negligence. Judgment dismissing the complaint with costs in favor of Continental and Marlin accordingly was entered on August 20, 1978. On that same day, the intervention by Travelers was dismissed at its own cost.

Wrangling Over Costs

Pursuant to Judgment, Marlin submitted a Bill of Costs to the Court requesting $822 for "cost of transportation to Drilling Rig offshore, Louisiana in connection with motion to compel entry" for two trips to the oil rig.[11] Costs were taxed against Guidry in accordance with this Bill of Costs on September 15, 1978.[12] Guidry immediately filed a Motion to Review

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11 Two separate helicopter trips were made by counsel for the parties. The first trip was made by Marlin, Offshore, and Continental on July 24, 1978. Guidry's counsel was supposed to make this trip also, but cancelled due to a conflict after Marlin had already paid for use of the helicopter. At Marlin's expense, a second helicopter trip was arranged on August 12, 1978, for Guidry's counsel to inspect the rig.

12 The total Bill of Costs filed September 13, 1978, was for $3,908.10 as follows:

BILL OF COSTS

Fees of the clerk	$ -
Fees of the marshal	-
Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case	661.10
Fees and disbursements for printing	-
Fees for witnesses (itemized on reverse side)	1,970.20
Fees for exemplification and copies of papers necessarily obtained for use in case	

and Set Aside the Bill of Costs as containing items not properly taxable under 28 U.S.C. §§1821 and 1920 as costs and not itemized so as to specify the charges sought for distinguishable subparts of the total claims.

Prior to Marlin's filing of its Bill of Costs, Guidry filed his appeal to this Court on September 6, 1978, with the entire record and a certified copy of the docket sheet being mailed to this Court on November 2, 1978. On February 22, 1979, the Court denied Guidry's motion, finding the costs were occasioned by his counsel's failure to make the first trip arranged at his request. Guidry on March 21, 1979, filed a Motion to Recall that ruling arguing the assessment of costs was not supported by the evidence and jurisprudence relating to such evidence. After oral argument, the Court on June 8, 1979, found that Marlin was seeking to have the cost of the first trip taxed as a sanction against Guidry for not complying with the discovery procedure he had initiated rather than taxing the expense as costs. Concluding Guidry's counsel was responsible for the

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Docket fees under 28 U.S.C. 1923	20.00
Costs incident to taking of depositions	349.50
Cost as shown on Mandate of Court of Appeals	-
Other Costs (Please itemize)	
Medical examination by Dr. Meuleman (not kept)	35.00
Cost of transportation to Drilling Rig offshore, Louisiana in connection with motion to compel entry	822.00
Medical examination by Dr. Meuleman on August 1, 1978	50.00
Total	$3,908.10

necessity of the second trip, District Court assessed $500 as a sanction for failing to cooperate in the discovery procedure Guidry initiated.[13]

Employer Liability — Jones Act?

With respect to the grant of summary judgment in favor of Guidry's employer, Offshore, Guidry argues District Court erred since he was a seaman. He contends the Jones Act extends coverage to "seamen" and "members of the crew of a vessel," that the terms are now used interchangeably, and that he was a member of the crew of a vessel. To support these contentions, Guidry cites our well-settled standards of determining seamen status set forth in *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959), providing a plaintiff may qualify as a seaman

> (1) if there is evidence that the injured workman was assigned permanently to a vessel (including speical purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and

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13 District Court entered this ruling on June 8, 1979, reasoning one of Guidry's counsel knew of the trip schedule on July 21, 1978, but failed to inform defense counsel until July 24, 1978, the date of the inspection, that co-counsel for plaintiff would be making the trip to the rig to conduct the inspection. In reaching this conclusion, District Court acknowledged Guidry's counsel failed to submit any reason for failing to inform defense counsel sooner that co-counsel desired to inspect the rig but was unable to make the July 24th date.

(2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.

Id. at 779.[14]

In light of these principles, Guidry claims he may attain seaman status by meeting either of these criteria. Initially, Guidry argues the Marlin Six was a vessel which we may safely assume is so. Guidry asserts he did more than merely eat and sleep on the vessel — that is, he substantially performed his casing duties aboard the Marlin Six and his duties pushing casing constituted a function essential to Marlin's mission of drilling for oil.

To this Offshore points out that the Court determined these factors did not sufficiently establish Guidry's status as a seaman where he was not permanently assigned to any vessel or group of vessels.

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14 These requisites were later refined by our decision in *Bodden v. Coordinated Caribbean Trans., Inc.*, 369 F.2d 273 (5th Cir. 1966), as (i) the vessel on which the claimant is employed must be in navigation, (ii) there must be a more or less permanent connection with the vessel, and (iii) the claimant must be aboard primarily to aid in navigation. More recently we stated to qualify as a seaman a claimant under the Jones Act "must be permanently assigned to or perform a substantial part of his work on the vessel, and the capacity of his employment must contribute t the function of the vessel, its mission, its operation, or its welfare." *Beard v. Shell Oil Co.*, 606 F.2d 515, 517 (5th Cir. 1979).

As in any civil case, we must review the record to assure no dispute over material facts exists. *Hodges v. S.S. Tillie Lykes*, 512 F.2d 1279, 1280 (5th Cir. 1975).[15] Thus, although, determination of a person's status as a seaman is ordinarily a mixed question of law and fact,[16] where the facts establish beyond question as a matter of law,[17] "[a] court . . . may, in the proper case, hold that there is no reasonable evidentiary basis to support a jury finding that an injured person is a seaman . . . under the Jones Act." *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1346 (5th Cir. 1980) (quoting *Beard v. Shell Oil Co.*, 606 F.2d 515, 517 (5th Cir. 1979)). It remains, however, the "moving party's burden to establish his right to summary judgment with such clarity that the non-moving party cannot recover (or establish the defense) under any discernible circumstance." *Everhart v. Drake Management, Inc.*, 672 F.2d 686, 690 (5th Cir. 1980).

Examining the pre-trial record under these precepts, we find Guidry was indeed performing his duties on a vessel.[18] The question remains, therefore, whether he

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15 *See, e.g., Holland v. Allied Structural Steel Co.*, 539 F.2d 476, 479-80 (5th Cir. 1976), *cert. denied*, 429 U.S. 1105, 97 S.Ct. 1136, 51 L.Ed.2d 557 (1977); *Owens v. Diamond M. Drilling Co.*, 478 F.2d 74, 76 (5th Cir. 1976).

16 *Crador v. Louisiana Dept. of Highways*, 625 F.2d 1227, 1229 (5th Cir. 1980).

17 *Landry v. Amoco Production Co.*, 595 F.2d 1070, 1072 (5th Cir. 1979).

18 Generally, floating rigs, because of their mobility, are treated as vessels. Robertson, *Injuries to Marine Petroleum Workers: A Plea for Radical Simplification*, 55 Tex.L.Rev. 973, 982 (1977). *See also generally* Annot. 75 A.L.R.2d 1312 (1961). The test used in this Circuit for

sufficiently met the remaining *Robison* requirements to establish his status as a seaman.

We conclude, however, he has not. Although Guidry was clearly performing duties essential to the function of the Marlin Six — pushing casing for oil wells — he has not shown any permanent assignemt or performance of a substantial part of his duties on either the Marlin Six or any other specified group of vessels. *See, e.g., Rotolo v. Halliburton Co.*, 317 F.2d 9, 13 (5th Cir. 1963).[19] In so holding, we are cognizant the word "permanent" was never been assigned a literal interpretation under the Jones Act and should not be given a "wooden application," but rather, is to be used as an analytical starting point instead of a self-executing formula. *Davis v. Hill Engineering, Inc.*, 549 F.2d 314, 337 (5th Cir. 1977) (citing *Brown v. ITT Rayonier, Inc.*, 497 F.2d 234, 337 (5th Cir. 1974)). Yet, the relationship between the individual and an identifiable vessel or group of vessels must be substantial in point and time, not spasmodic. *Braniff v. Jackson Ave.-Gretna Ferry, Inc.*, 280 F.2d 523, 428 (5th Cir. 1960). The key is that there must be a relationship between the claimant and a specific vessel or identifiable group of vessels.

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determining whether a water craft constitutes a Jones Act vessel requires examination of (i) the purpose for which it is constructed, and (ii) the business in which it is engaged. Sipple, *Admiralty*, 31 Mercer L.Rev. 825, 831 (1980).

19 In reaching these conclusions, we remain aware of Guidry's contentions he may be considered a Jones Act seaman if he meets either criteria set forth in *Robison*. Fifth Circuit case law is clear, however, Guidry must meet all of the *Robison* requirements, not merely one or another.

Guidry's deposition was quite explicit his assignment to any particular structure was random. At no time was he assigned to work on a particular rig on a continuing or regular basis. *See, e.g., Stokes v. B. T. Oilfield Services, Inc.*, 617 F.2d 1205, 1207 (5th Cir. 1980); *Keener v. Transworld Drilling Co.*, 468 F.2d 729, 732 (5th Cir. 1972). Indeed, of the forty different rigs Guidry was assigned to during his career, thirteen were non-vessel fixed platforms, seven were on land, and of the remaining twenty movable rigs he was on thirteen only once and never did he return to a specific rig more than three times.[20]

Unseaworthiness Claim as to Offshore

Failing to establish his status as a Jones Act seaman, what rights of recovery does Guidry possess against Offshore on his unseaworthiness claim? Because Marlin, not Offshore, is the owner of the vessel, Guidry's claims against Offshore for unseaworthiness must fail as the remedy traditionally is available only against the shipowner and the vessel. *Stokes v. B. T. Oilfield Services, Inc.*, 617 F.2d 1205, 1207 (5th Cir. 1980). This is true even if Offshore were indeed liable. *Wixom v. Boland Marine & Mfg. Co.*, 614 F.2d 956, 957 (5th Cir. 1980). He may not recover on his unseaworthiness claim.

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20 Offshore's uncontradicted exhibits seven, twelve, and sixteen reflected, assignment by assignment, nature and type of rig and hours spent in boat time, waiting time, and working time on "vessel" rigs. Work time ran from a minimum of two hours to a maximum of eighteen; waiting time from a minimum of four hours, maximum fifty-eight; boat time from a minimum of one hour, maximum of nineteen.

What About LHWCA?

Guidry is limited to recovery for his injuries under LHWCA §905(b).[21] *See, e.g., Billings v. Chevron, U.S.A., Inc.*, 618 F.2d 1108, 1109 (5th Cir. 1980). In granting summary judgment, however, the District Court understandably made no mention regarding Guidry's

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21 Title 33 U.S.C. §905(b) provides:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

The Outer Continental Shelf Lands Act, 43 U.S.C. §1333, as enacted in 1953, extended coverage of the LHWCA, 33 U.S.C. §§901-50 (1976 & Supp. I & II 1977-78), for injuries or deaths occurring to employees on the Outer Continental Shelf. *See, e.g., Longmire v. Seas Drilling Co.*, 610 F.2d 1342, 1351-52 (5th Cir. 1980). Because Marlin was the vessel owner while Guidry was employed by Offshore, Guidry is limited to recovering only compensation benefits from Offshore and may not also maintain a third party action for negligence under the LHWCA against Offshore. *See, i.e., Smith v. M/V Captain Fred*, 546 F.2d 119 (5th Cir. 1977).

right to LHWCA benefits against Offshore. Without intimating any assessment as to Guidry's right to recover benefits, our affirmance is without prejudice to whatever claims against Offshore he has under LHWCA §905(b).[22]

Liability of Continental and Marlin

Since Continental and Marlin were not Guidry's employers, but rather, third parties involved in the accident, and, the Court granted directed verdicts in their favor at the close of Guidry's evidence, we must examine Guidry's claims and status independently from any determinations made with respect to Offshore.

As to the so-called Jones Act claim, for the reasons discussed as to Offshore, we again conclude sufficient evidence was not presented to show Guidry was a Jones Act seaman. Guidry's trial testimony clearly negated his claims for Jones Act seaman's status as set out by *Robison*. At no time was Guidry assigned to any specific vessel or group of vessels. *Braniff*, 280 F.2d at 528. Nor did he perform a substantial part of his duties on either the Marlin Six or any other specified group of vessels. *Id.* Taking all relevant inferences in Guidry's favor we conclude District Court properly determined Guidry was not entitled to recover against either Continental or Marlin as a Jones Act seaman.

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22 Our holding includes all questions of Traveler's obligations to Offshore as LHWCA compensation carrier. *See* 33 U.S.C. §933(h).

As to a general maritime claim against Continental, Guidry argues the Court erred in directing the verdict in favor of Continental because it applied the wrong standard in reviewing the evidence and should not have taken the case from the jury. Moreover, Guidry complains, if a directed verdict was in order, the greater weight of evidence required that it be directed in his favor. Guidry specifically contends the Continental "company man" was responsible for overseeing the whole operation and was in charge at the time the accident occurred since Continental owned the well. He claims Continental was negligent is securing the hoses for the power unit, having obtained ones which were too short, and as a result, forced the power unit to be placed on the rig floor instead of the floor below, causing congestion. He also claims the rig floor was covered with mud and water which caused him to fall.

In response to these allegations, Continental points out Guidry admitted on cross-examination (i) he did not even know who the company man for Continental was, (ii) had an opportunity to conduct a safety inspection of the rig floor before commencing his work, but failed to do so, and (iii) it was common for rig floors to be covered with mud and water. Continental also counters Guidry was the sole person in charge of the rig floor at the time the accident occurred.

We conclude there is insufficient basis to support any general maritime negligence claim against Con-

tinental. No Continental employee was on the rig floor at the time of the accident nor did any Continental employee have anything to do with or responsibility for, this operation. Guidry established the rig floor was covered with mud and water and the hoses for the power unit secured by Continental were too short, but did not adequately establish that Continental was negligent in attempting to secure proper hoses or in maintenance of the rig floor conditions. On the contrary, it was shown mud and water covered rig floors are an accepted, frequent occurrence as part of these operations. Under such circumstances we cannot conclude Continental was negligent nor its actions a substantial legal cause of Guidry's injuries. For these reasons, Guidry's claims against Continental were properly dismissed on directed verdict. *Hebron v. Union Oil Co.*, 634 F.2d 245, 247 (5th Cir. 1981); *Caldwell v. Manhattan Tankers Corp.*, 618 F.2d 361, 362-63 (5th Cir. 1980); *Boeing Co. v. Shipman*, 411 F.2d 365, 374-76 (5th Cir. 1969) (en banc).

With respect to Marlin, Guidry additionally argues the Marlin crane operator disregarded the instructions of Offshore floor-hand Simoneaux to bring casing equipment up to the rig floor one at a time as the casing crew needed it. Instead, Guidry contends the Marlin crane operator placed all the equipment and had all the drill pipe on the floor contrary to normal practice. Guidry suggests Marlin was negligent due to the fact the Marlin Six had an upset rotary table, normally platforms had rotary tables which were flush with the rig

floor, and if the rotary table had been as normal, his foot would have been simply pushed aside rather than crushed when the elevators began to swing.

Since we have already determined Guidry was not a seaman his claims must be analyzed in light of the 1972 amendments to the LHWCA, 33 U.S.C. §905(b) (1978), which permits recovery of damages caused by the negligence of the third party. *Mallard v. Aluminum Co.*, 634 F.2d 236, 242 (5th Cir. 1980). In granting the directed verdict, however, District Court did not explicitly state it was denying Guidry's claims under the LHWCA. Nevertheless, the ruling was sufficiently articulated to permit our review of Guidry's LHWCA remedies under appropriate standards.

This Circuit has adopted a negligence standard governed by concepts of a landowner's duties to his invitees as enunciated in §343A(1) of the Restatement (Second) of Torts:

> A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.[23]

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23 *See Stockstill v. Gypsum Transportation*, 607 F.2d 1112, 1116-17 (5th Cir. 1979); *Wiles v. Delta Steamship Lines, Inc.*, 574 F.2d 1338, 1340 (5th Cir. 1978); *Samuels v. Empressa Lineas Maritimas Argentinas*, 573 F.2d 884, 886 (5th Cir. 1978); *Hess v. Upper Mississippi Towing*

Restated in terms of vessel owners and contractor employees, these negligence criteria "subject a shipowner to liability only if he knows or has reason to know of an unreasonably dangerous condition on the vessel of which the [employee] is probably not aware and fails to exercise reasonable care to make the condition safe or warn the longshoreman." *Mallard*, 634 F.2d at 243. We acknowledge that the Ninth Circuit has established a contrary standard.[24]

Corp., 559 F.2d 1030, 1035-36 (5th Cir. 1977), *cert. denied*, 435 U.S. 924, 98 S.Ct. 1489, 55 L.Ed.2d 518 (1978); *Brown v. Mitsubishi Shintku Ginko*, 550 F.2d 331, 333-34 (5th Cir. 1977); *Gay v. Ocean Transport & Trading Co., Ltd.*, 546 F.2d 1233, 1238 (5th Cir. 1977). These standards were adopted in the interest of achieving the Congressional desire of uniformity that §905(b) be applied with an effort to fulfill the following policies:

> (1) Congress intends for the federal courts to develop a uniform federal common law to control LHWCA suits against vessels.
>
> (2) That LHWCA federal common law is to be based on negligence concepts; the unseaworthiness of a vessel is not an acceptable ground for relief.
>
> (3) LHWCA negligence law is to be guided primarily by analogy to land-based law concepts. The stevedore is to be viewed generally as an independent contractor and its employees as invitees of the vessel owner.
>
> (4) However, certain common land-based principles of state law are not to be carried over into the federal law governing LHWCA suits. Assumption of risk may not be utilized as a defense, and comparative negligence, rather than contributory negligence, is to be applied.

Id. at 1237-38.

24 The Ninth Circuit has declined to follow the land based notions of negligence under §343A of the Restatement, instead adopting the following less rigid standard:

> A vessel is subject to liability for injuries to longshoremen working on or near the vessel caused by conditions on the vessel if, but only if, the shipowner (a) knows of, or by the exercise of reasonable care would

Reviewing the facts in light of either or both of these standards, Guidry has not shown Marlin (i) knew or had reason to know of any unreasonably dangerous condition, and (ii) failed to exercise reasonable care to make the condition safe or warn him. The equipment was sitting securely on the rig floor when Guidry arrived on the rig floor. No Marlin employee was on the rig floor at the time the accident occurred. Guidry was the sole supervisory person on the rig floor when he was injured. It was Guidry's duty, not Marlin's, to assure his co-employees were conducting their work in a safe manner. Guidry, under the circumstances of this case, may not claim any actions taken by Marlin prior to his arrival on the rig floor caused the accident. If location of some of the tools afforded some obstacle to a safe performance of the work, the condition was perfectly apparent to all with no showing that the condition or its hazards would not be known to Guidry and his crew. Indeed, Guidry did not challenge this fact, nor was there any sufficient showing that Marlin should realize that it involved an unreasonable risk to Offshore's workers. Under such circumstances we must deny Guidry recovery for it is well settled "[i]f 'either the [contractor] or his employee is in [a] better position to appreciate fully the [obvious] risk and avoid the danger,

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discover, the condition, and should realize that it involves an unreasonable risk of harm to such longshoremen, and (b) the shipowner fails to exercise reasonable care under the circumstances to protect the longshoremen against the danger.

Santos v. Scindia Steam Navigation Co., 598 F.2d 480 (9th Cir. 1979), *cert. granted* 446 U.S. 934, 100 S.Ct. 2150, 64 L.Ed.2d 786 (1980).

particularly where the danger is within the control of the [contractor's] own employees', the vessel owner will not be liable." *Id.* (*quoting Stockstill v. Gypsum Transportation*, 607 F.2d 1112, 1117 (5th Cir. 1979)).

Although Guidry may previously have sought damages for unseaworthiness against Marlin,[25] he may not do so since LHWCA §905(b) limits third party recovery to negligence.

The Sanction

Guidry's final complaint is District Court erred by imposing a $500 sanction against his counsel for costs and expenses incurred by Marlin for transportation to the drilling rig in connection with the motion to compel entry. He argues the expenses improperly were taxed against him pursuant to 28 U.S.C. §1920[26] and

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25 *See, e.g., Stokes v. B. T. Oilfield Serv., Inc.*, 617 F.2d 1205, 1207 (1980).

26 Title 28 §1920 (1948 & Supp. 1978) provides:

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

F.R.Civ.P. 37. Moreover, Guidry asserts he did not engage in acts which warrant imposition of sanctions. Consequently, Guidry alleges District Court could not assess the costs against him when no court order was ever violated nor after he filed his appeal when the record had not been held open.

Reviewing the record, however, we agree with District Court's imposition of sanctions. The sanctions enumerated by F.R.Civ.P. 37 are not exclusive or arbitrary. Instead, they are flexible and, within reason, may be applied in as many or varied forms as the Court desires by exercising broad discretion in light of the facts of each case. 8 Wright & Miller, Federal Practice and Procedure: Civil §2289, at 791 (1970). Rule 37 only requires the sanctions the Court imposes "hold the scales of justice even." 8 Wright & Miller, Federal Practice and Procedure: Civil §2284, at 764 (1970).

More specifically, subsection (d) of Rule 37 permits District Court, in lieu of any order, to require the party failing to respond to a request for inspection issued pursuant to F.R.Civ.P. 34(a)[27] "to pay the reasonable

27 F.R.Civ.P. 34(a) provides:

Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things

expenses, including attorneys' fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." Rule 37(d) comes into play when a notice of the inspection has been properly served. 8 Wright & Miller, Federal Practice and Procedure: Civil §2291, at 807 (1970). No specific court order is required. *Id.*

In this case, co-counsel for Guidry requested at a pretrial conference they be permitted to inspect the rig. Defense counsel, by letter dated July 19, 1978, informed Guidry's counsel the rig would be available for inspection on July 24th. Co-counsel for Guidry's main counsel had notice on July 21st of the scheduled July 24th inspection. Guidry's counsel failed to notify defense counsel until July 24th, the date of the inspection and after defense counsel had already paid for a helicopter trip to the rig, that Guidry's main counsel wished to inspect the rig personally but would not be able to make the July 24th date. Nor was any reason offered why Guidry's other counsel could not attend the July 24th inspection. The costs resulting from two separate trips to the oil rig constitute undue expenses

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which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

incurred due to a lack of prompt communication on the part of Guidry's counsel to defense counsel.

We also fail to find merit in Guidry's argument sanctions may not be imposed where the record was not held open. The request Guidry be required to pay for the transportation expenses was filed well before Guidry appealed. Similarly, the assessment of these costs were imposed against Guidry prior to filing of the appeal and certification of the record to this Court on November 2, 1978. Any actions taken after that date were to rule on motions filed by Guidry. Federal Rules of Civil Procedure 54(b) permits District Court to enter final judgment as to one or more but fewer than all the parties' claims. Federal Rule of Appellate Procedure 10 provides for the filing of a supplemental record as was done in this case to add after a certified record has been forwarded to the Court of Appeals any material omission affecting the parties' rights. Guidry cites no authority supporting his claim District Court could not impose sanctions when the record had not been held open where the proceedings were initiated prior to filing of his appeal.[28]

District Court granted the sanctions due to Guidry's counsel causing an unnecessary incurrence of expenses. While no technical violation of any particular

28 The only authority Guidry cites is *Suffold v. McGraw Edison Co.*, 566 F.2d 621 (8th Cir. 1977). In *Suffold*, however, no hearing, order, or other proceedings had been initiated prior to filing of appeal as in the instant case.

rule was made by Guidry's counsel, District Court's imposition of sanctions in this case was in keeping with the spirit of the rules. Nor do we find District Court exceeded its jurisdiction by ordering the sanctions after Guidry appealed. Without engaging in concepts of District Court's retention or loss of jurisdiction or whether we had acquired jurisdiction prior to imposition of the sanction, we simply approve the District Court's action as within its broad discretion.

Judgment of District Court was correct.

AFFIRMED.

APPENDIX B

DISTRICT COURT'S ORAL REASONS

[696] Continental's motion; on this, the Court will not spend a lot of time, it is going to grant the motion, and with this comment; that it finds that Continental was the lease owner; that Continental, of course, was responsible for the people, both Marlin's crew and people and Offshore crews and people being out there. They were hired for the job. So far as the Court can see from the evidence, both of these companies were independent. And that although Continental did employ these independent contractors, as is in the usual case, he exercises some control over them, or it did. And I have no doubt that if the company man, meaning Con-

tinental's man, saw something being done by either personnel of Offshore or Marlin that his orders, corrective orders, if you want to call them that, or orders to the contrary, whether they were corrective or not, would have carried weight and probably would have been followed, although there had been nothing on it, and if Continental's authority went further than that. The Court doesn't feel that there is any evidence in the record that Continental had the duty of supervising the details of the work done by each one of these independent contractors. I think that, and if in actuality Continental did, the Court does not recall one iota of evidence in this lawsuit which would establish that it did. So it feels that there is no issue for the [697] jury on this matter and Continental is therefore dismissed. I have had a lot more difficult time deciding the matter of Marlin's motion for Dismissal. And after going over it in my mind, having the time to go over in mind the matters which the Court feels are established without controversy, which, of course, is greater than it has to find, it feels that this motion also must be granted. I found the following matters established by the evidence beyond controversy; that is, that on the drill floor at the time of the accident Offshore and Offshore's pusher, Plaintiff Guidry, was in complete control. I find that some fifteen minutes or so before the accident, and most of these are based on plaintiff's testimony, that some fifteen minutes before the accident the Offshore crew came on to the drill floor. Secondly, that at that time the tong unit had been lifted by Marlin's crane operator and was situated at the V-door.

Third, at the time that the Offshore crew came up, the Marlin pusher also came up and either by joint direction or both or by direction of the Marlin pusher the tong unit, weighing as I recall some two thousand pounds, was moved from its position. Thirdly, I find that in moving it from this position to the position adjacent to the drill pipe, the crew, the Marlin pusher, as well as the Offshore crew and pusher, used a jerkline; that during the time, according to plaintiff's estimate this was about ten minutes, [698] that this was being accomplished, the Marlin crane operator placed also in the vicinity of the V-door the balance of the equipment; namely, the spider, the horseshoe and the tongs, and that these were all in an area near the V-door. Next, that after the moving of the tong unit was completed, a period of some ten minutes from when it began, plaintiff, who was Offshore's pusher, became aware, became appraised of the fact that the other three units; that is, the tongs, the spider and the horseshoe unit were also on the drill floor and were situated and had been placed adjacent to the V-door; that he was appraised of that, and also at the same time he became aware of their position, he became also aware of the fact that the stabber, Mr. Hazlett, was attaching the catline to the ears of the tong.

MR. GUGLIELMO:

I believe it was the elevator.

THE COURT:

Elevator, excuse me. And when I was saying tongs here I am referring — I have in the past, I was referring

to elevators; that there is no evidence that Marlin's pusher, or any member of Marlin's crew, was on the floor at that time, or had any part in directing any action at that time. The Court find further, as uncontroverted in the evidence so far, that plaintiff, who was Offshore's pusher, had the immediate duty and authority to determine what should be done next, or what [699] option should be taken, whether the jerkline should be used to straighten these tools out before any lift line was employed, or whether or not to do so. It is a matter uncontroverted that this line was used certainly to move a much heavier piece of machinery; namely, the tong unit, which action had just been completed. The Court finds that the air hoist was located to the right of the V-door and was a means provided by Marlin, dash, Continental, which could have been used for lifting purposes just as easily as the catline was used; that there was, insofar as the evidence shows, nothing impeding any view from that station to the area in which the equipment was located; that the decision to use the catline was a decision of Mr. Hazlett, Offshore's second in command; that the Court finds also that Mr. Hazlett and plaintiff himself had a much better view, an unobstructed view, was right next to the machinery and could see its location and determine better than anyone else how and whether it should be moved, whether its placement should be changed before it was lifted. I find also beyond controversy that plaintiff knew that when those elevators were lifted, that as soon as they were off the ground that the weight would take them toward the middle, toward

him, toward his position and knowing that if they were interferred with or obstructed by the tong unit and the spider, [700] he was the person best able to observe that, and he was the person who had the primary duty and responsibility to observe that, both for safety of himself and for the safety of his crew and in the interest of proper and efficient operation; that neither Continental nor Marlin, under the evidence, is shown to have had any knowledge of that situation; and that situation, as acknowledged by all who have testified, including the plaintiff, on the subject before the lift was accomplished, was not dangerous and did not have a dangerous potential until lifted. The Court finds, therefore, that the proximate cause of the accident was not the placement of the equipment but the decision and the action of plaintiff and of Hazlett jointly, because although Hazlett initiated this decision, plaintiff joined in it and never attempted to change the decision, didn't tell Hazlett he should do something else before trying to lift it. All of these things were done by plaintiff and Hazlett, without any direction insofar as the evidence shows, without any duty on the part of either of the defendants to take any part in it. This was the proximate cause of the accident. These are things which the Court feels have been established by the evidence without any controversy whatsoever. And based on these findings, the Court finds that if it were called upon to do so, it would have to find that plaintiff was a hundred [701] percent contributory negligent in this accident, even if it found negligence on the part of any other party. Based on these findings the motion to

dismiss Marlin is granted. I would ask that the jury be brought in, please. I would ask that the parties submit — and would also state for the record that the Court is going to give written reasons for its decision in the summary judgment motion filed by Offshore. It has not had time yet to do that. But I will file those in these proceedings.

MR. GUGLIELMO:

Your Honor, I have an order on that, that I would like to present to the Court. And there was an ancillary matter strictly between Mr. Blackwell and myself on the cross claim.

THE COURT:

All right.

MR. GUGLIELMO:

It would be appropriate that I mention that at this time.

THE COURT:

All right, sir.

MR. GUGLIELMO:

The only thing that I think in view of this that I might consider filing would have been the contract between Continental — the contract that exists, and I would like, in view of the fact that Your Honor is going to assign written reasons, to have a period of, say, about three days so that I could confer with my client. It may be that we will not proceed further with the cross claim. Now, if we do, I don't think any evidence . . .

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-3474

MICHAEL GUIDRY,
Plaintiff-Appellant,

versus

CONTINENTAL OIL COMPANY, ET AL.,
Defendants-Appellees.
TRAVELERS INSURANCE COMPANY,
Intervenor-Appellee.

Appeal from the United States District Court for the Western District of Louisiana

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ON PETITION FOR REHEARING
(April 6, 1981)

Before BROWN, AINSWORTH and FRANK M. JOHNSON, JR., Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:
/s/ JOHN R. BROWN
United States
Circuit Judge

CLERK'S NOTE: See Rule 41 FRAP and Local Rule 17 for Stay of the Mandate.

APPENDIX D

33 U.S.C. §905(b)

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedor-

ing services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.